

# **Terrorism Legislation: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001**

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## Summary

On Thursday, October 25, 2001, the Senate approved House-passed H.R. 3162, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act which bolsters the ability of federal authorities to conduct criminal and intelligence investigations, to bar and expel foreign terrorists from the United States, to separate terrorists from their sources of financial support, to punish acts of terrorism, and to address the needs of the direct victims of the events of September 11. The Act is a merger of two bills, S. 1510, and H.R. 2975/H.R. 3108 which had earlier passed in their respective Houses. It melds the money laundering aspects of S. 1510 with those of the free standing, House-passed money laundering bill, H.R. 3004. A variant of the House sunset provision survives, but adjustments to the McDade-Murtha Amendment concerning the adherence of federal prosecutors to local ethical standards do not. Detention authority over immigrants suspected of terrorist connections remains; as do the benefits to immigrants victimized by the events of September 11. The President signed the bill on Friday, October 26.

## Wiretapping

Although some of the Act's more controversial features were popularly characterized as wiretap amendments, they actually focused upon related but less intrusive procedures. Federal law outlaws the interception of telephone conversations (wire communications), face to face conversations (oral communications), and computer traffic (electronic communications) (18 U.S.C. 2510-2512, popularly known as "Title III"). However, it permits law enforcement officers to secretly intercept these communications in the course of serious criminal investigations when operating under a tightly confined court order.

Investigators may use a less demanding procedure when they wish to surreptitiously retrieve a suspect's stored electronic communications (e.g., e-mail) or telephone or other communications records (18 U.S.C. 2701-2711 or "chapter 121"). When they simply wish to identify the source of the calls made to or from a particular telephone, they may use the less intrusive and consequently less demanding procedures for a court pen register or trap and trace order (18 U.S.C. 3121-3127 or "chapter 206").

Intelligence officers, who operate without criminal law enforcement authority, have recourse to more narrowly drawn procedures comparable to those for Title III orders, search warrants, and pen register/trap and trace orders (Foreign Intelligence Surveillance Act, 50 U.S.C. 1801-1863 or "FISA").

The law enforcement changes in the USA PATRIOT Act include:

- adding the crimes of computer abuse, supporting terrorists and terrorist organizations, using weapons of mass destruction, committing terrorism against Americans overseas and multinational terrorism to the list of crimes for the investigation of which a Title III order is available;
- allowing secret retrieval of voice mail under the stored e-mail procedure rather than under Title III;
- extending the telephone pen register/trap and trace procedure to be used to determine the sender and address of e-mail messages as well, with a reporting requirement to ensure that the contents of an e-mail are not captured as part of the pen register/trap and trace;
- permitting judges in districts where the crime under investigation occurred to issue pen register/trap and trace orders regardless of where the telephone or e-mail servers are located;
- permitting judges in districts where the crime under investigation occurred to issue warrants for the content of stored e-mail and voice mail regardless of where the storage facilities are located;
- creating an exception to Title III under which a system provider may permit a law enforcement interception of the communications of a trespasser within the system; the House bill adds that only communications in or through the system may be intercepted;
- calling for expiration of most of these amendments and those to FISA with respect to crimes committed or foreign intelligence investigations initiated after December 31, 2005.

Limitations on foreign intelligence gathering in this country are the product of the Supreme Court's refusal to accept a national security exception to the Fourth Amendment's search and

seizure requirements for domestic terrorist interceptions, apprehension over creation of a secret police force, and concerns over alleged intelligence community abuses during the Vietnam Conflict. The Act eases some of those limitations and recasts the procedures for foreign intelligence gathering in this country by:

- allowing interceptions when intelligence gathering is a *significant* rather than the sole purpose for the FISA order;
- expanding the FISA pen register/trap and trace authority to include computer communications (e.g. e-mail);
- increasing the number of judges who may issue FISA orders from 7 to 11;
- extending the permissible duration of FISA interception orders and search warrants;
- permitting roving (not telephone line, location, or computer equivalent specific) pen register/trap and trace orders;
- authorizing emergency FISA pen register/trap and trace orders;
- eliminating the requirement that the target of the pen register/trap and trace order be a foreign power, agent of a foreign power, or international terrorist;
- adding the caveat, however, that FISA pen register/trap and trace orders may not be secured in the intelligence investigation of an American (actually a somewhat more broadly defined “U.S. person”) based solely on the exercise of First Amendment rights;
- establishing, nevertheless, that serious abuses of the FISA, Title III, or chapters 121, or 206 may be grounds for administrative discipline and give rise to a claim against the United States.

## Other Investigation Enhancements

The Act grants increased law enforcement and intelligence gathering powers in other areas. It:

- allows “sneak and peek” warrants, warrants under which officers may conduct a search secretly but delay notice of the search if it would adversely impact the investigation; except when the court considers it reasonably necessary, however, it does not provide authority to seize either tangible evidence or wire or electronic communications (which might otherwise have been seized in a virtual search);
- permits intelligence officers to receive grand jury disclosures involving foreign intelligence information, but with a report to the court on information disclosed and to whom it was disclosed;
- permits intelligence officers to receive wiretap disclosures involving foreign intelligence information;
- permits intelligence officers to receive foreign intelligence information unearthed during a criminal investigation;
- authorizes court orders for access to tangible items in connection with an intelligence investigation as long as the investigation of any U.S. person is not based exclusively on 1<sup>st</sup> amendment protected activities;
- authorizes federal judges to issue warrants with respect to crimes within their jurisdiction regardless of where the warrants are to be executed;

- broadens Justice Department access to third party records held by communication providers, banks, consumer credit agencies, and educational institutions;
- authorizes appropriations for regional computer forensic laboratories (\$50 million), federal-state-and-local multijurisdictional criminal information sharing systems (\$150 million), creation of a FBI technical support center (\$600 million), for equipment enhancements on the Northern Border (\$100 million), study of the feasibility of making the FBI's automated fingerprint file available to check on visa applicants (\$2 million).

## Immigration

Terrorism is already grounds for exclusion or removal of a foreign national from the United States. Triggering definitions of terrorist activities, engaging in terrorist activities, and terrorist organizations grow more inclusive under the Act. It vests the Secretary of State with an alternative means of designating terrorist organizations. The Attorney General is empowered to jail aliens for up to a week before deciding whether to begin a prosecution or immigration proceeding for removal. It carries forward earlier House suggestions for the benefit of immigrants and the immigrant families of those killed or disabled on September 11, 2001.

## Money Laundering

The Act's money laundering sections deal with international money laundering, Bank Secrecy Act amendments, as well as currency crimes and penalties. Among other things, it grants the Secretary of the Treasury increased authority to impose special record-keeping measures upon U.S. financial institutions dealing with countries serving as money laundering havens, and to require due diligence from U.S. financial institutions with respect to private bank and correspondent accounts held for foreign nationals. It increases federal forfeiture authority by:

- subjecting terrorists' assets to confiscation;
- permitting the substitution of funds in interbank accounts held in the U.S. on behalf of foreign banks who are holding forfeitable assets on deposit overseas;
- expanding confiscation authority to include the proceeds from misconduct abroad in violation of foreign law;
- establishing a procedure to enforce foreign forfeiture decisions; and
- barring the right of a corporate entity to contest confiscation if its major shareholder or representative in the contest is a fugitive.

The Act amends the Bank Secrecy Act, the Right to Financial Privacy Act and the Fair Credit Reporting Act to afford U.S. intelligence agencies greater access to financial records when conducting intelligence and counterintelligence investigations. Numbered among other Bank Secrecy Act changes are provisions which extend reporting and record-keeping requirements to informal money transfer businesses; require nonfinancial businesses to report transactions involving more than \$10,000 in cash; and direct a study of possible improvements in the currency transaction reporting system.

## Crime, Punishment, and Procedure

The Act creates new federal crimes, raises the penalties for existing crimes, and eases the government's procedural burdens with an eye to discouraging and punishing terrorism. More specifically, it:

- makes it a federal crime to harbor a terrorist, or commit an act of violence against public transportation, and outlaws possession of biological agents by fugitives, convicted felons and the like;
- increases the penalties for counterfeiting offenses and for conspiracies to commit a number of terrorist crimes;
- adds terrorist crimes to the federal racketeering predicate offenses (RICO) list which outlaws conducting the affairs of an enterprise whose activities affect interstate commerce through the patterned commission of various underlying offenses;
- eliminates the statute of limitations for any terrorist offense that involves the foreseeable risk of serious injury, and lengthens the period for several others;
- boosts the penalties for some computer abuse crimes;
- permits the federal prosecution of more crimes committed overseas either on federal facilities or involving American credit cards, pin numbers and the like; and
- conveys additional authority on the Attorney General and Secretary of State to offer and pay rewards in cases of terrorism.

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